

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

TRUCK DRIVERS, CHAUFFEURS AND	:	
HELPERS LOCAL UNION NO. 100,	:	
AFFILIATED WITH THE	:	
INTERNATIONAL BROTHERHOOD OF	:	
TEAMSTERS (BETA PRODUCTIONS,	:	CASE NO. 9-CB-232458
LLC),	:	
	:	
Respondent,	:	
	:	
and	:	
	:	
SAMUEL J. BUCALO, AN INDIVIDUAL,	:	
	:	
Charging Party.	:	

**RESPONDENT’S BRIEF IN SUPPORT OF ITS EXCEPTIONS
TO THE RECOMMENDED DECISION AND ORDER
OF THE ADMINISTRATIVE LAW JUDGE**

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	BACKGROUND.....	2
III.	ARGUMENT.....	10
	A. The evidence did not establish the Union maintained any animus toward Mr. Bucalo, nor that there was any nexus between any alleged hostility and the Union’s drafting of its movie industry referral policy.....	11
	1. The General Counsel did not establish actual animus toward Mr. Bucalo based upon his history of union dissident activity.....	13
	2. The mention of Mr. Bucalo’s name during a discussion of the need for a sick leave policy for film production work did not indicate animus.....	16
	3. The Union desired to establish a written referral policy even before Mr. Bucalo’s ULP charge that led to a June 2018 non-admission settlement with the Regional Director; thus, no animus could be inferred from the establishment of a written referral policy.....	18
	4. The Union drafted the film referral policy over the course of several months with input from a variety of members; ultimately the Union decided to continue its practice of referring retirees last, a practice that predated Mr. Bucalo’s involvement in film work.....	20
	5. The ALJ’s Decision ignores that other common indicia of animus were not present.....	23
	B. Even when animus does exist between a union member and the union, the General Counsel still must establish a ‘nexus’ between the animus and the action.....	25
	C. Even in the absence of Mr. Bucalo’s dissident union activity, the Union would have drafted a film referral list that placed retirees in the lowest referral category, for legitimate reasons.....	27
	D. The referral rules do not discriminate on the basis of union membership.....	29
IV.	CONCLUSION.....	30

TABLE OF CASES

<u>Brand Mid-Atlantic, Inc.</u> , 304 NLRB 853 (1991).....	26
<u>Camaco Lorain Manufacturing Plant</u> , 356 NLRB 1182 (2011)	12
<u>DynCorp, Inc. v. National Labor Relations Board</u> , 233 Fed. App'x 419 (6 th Cir. 2007).....	27
<u>IATSE Local 592</u> , 266 N.L.R.B. 703 (1980)	18
<u>Local Union No. 948, International Brotherhood of Electrical Workers, v. National Labor Relations Board</u> , 697 F.2d 113 (6th Cir. 1982).....	29
<u>NLRB v. Fluor Daniel, Inc.</u> , 161 F.3d 953 (6 th Cir. 1998).....	25
<u>NLRB v. General Fabrications Corp.</u> , 222 F.3d 218 (6 th Cir. 2000).....	12, 25
<u>NLRB v. Transportation Management Corp.</u> , 462 U.S. 393 (1983).).....	12
<u>Stage Employees Local 412</u> , 308 N.L.R.B. 1084 (1992)	18
<u>Teamsters Local Union No. 200</u> , 357 NLRB 1844 (2011).....	13
<u>Teamsters Local 631</u> , 340 NLRB 881 (2003).....	12
<u>W.F. Bolin Co. v. National Labor Relations Board</u> , 70 F.3d 863 (6 th Cir. 1995)	12, 23
<u>Wright Line</u> , 251 NLRB 1083 (1968),.....	12, 25

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I. INTRODUCTION

This matter arose from an unfair labor practice charge filed against Respondent Teamsters Local Union No. 100, an affiliate of the International Brotherhood of Teamsters (“Respondent,” “Local 100,” or “the Union”) (referred to in the case caption as Truck Drivers, Chauffeurs and Helpers Local Union No. 100) by former officer and member Samuel J. Bucalo. The charge, and the subsequent complaint, alleged that the Union violated Section 8(b)(1)(A) of the Act by promulgating and maintaining an illegal hiring hall referral system for the television and film industry.

The case was tried before Administrative Law Judge Arthur Amchan on August 26 and 27, 2019, in Cincinnati, Ohio; the ALJ issued a Recommended Decision and Order on October 24, 2019, JD-82-19, concluding that the Union breached its duty of fair representation by placing

retirees in the lowest preference category for referral for film work and by classifying employees in categories according to experience in the “Teamster Movie Industry” and the number of productions in which they have performed “Teamsters work,” thus discriminating based upon union membership. The Respondent has filed Exceptions to this recommended Decision and respectfully submits that the evidence does not establish that the Union’s actions were arbitrary, discriminatory, or in bad faith and, specifically, that the evidence does not show it acted out of any animus toward Mr. Bucalo.

II. BACKGROUND

The facts here are taken from the record adduced before the ALJ at the trial in this matter as well as from the record of a prior trial on an earlier charge filed by Mr. Bucalo, case number 09-CB-214166, tried in July 2018. The parties stipulated that the ALJ may take administrative notice of the contents of the record in that case, including not only the testimony (cited as 2018 Tr.) and exhibits but also the parties’ briefing and the Respondent’s exceptions to the recommended decision of the ALJ in that case, which are still pending before the Board.

Local 100 is a large local union with approximately 4,800 members in the greater Cincinnati area; employees of United Parcel Service (“UPS”) constitute the largest group of its members, numbering approximately 2,300. The Charging Party, Mr. Bucalo, was an employee of UPS and became a member of the Union in March 1979. He served as a Union steward or alternate periodically for some 25 years during his employment; he was elected to the office of Secretary-Treasurer of Local 100, a full-time Union position, for a three-year term beginning January 1, 2011, and re-elected to a second, three-year term beginning January 1, 2014.

In early 2011, shortly after his initial election, Mr. Bucalo voluntarily retired from his employment at UPS. 2019 ALJ Decision at 2-3. He did so in settlement of a grievance over his

discharge for “no-call/no-show” after he failed to take a leave of absence from work when he started to serve as a Union officer.¹ Mr. Bucalo began receiving a pension from UPS, which he described as an “early” retirement benefit; based on his age and years of service, the monthly amounts he receives in pension total \$2,323. 2019 ALJ Decision at 3.

Mr. Bucalo ran for the position of Local 100 President in an election held in late 2016 for a term to begin January 1, 2017. He was not successful in that election and thereafter has held no other Union office. After Mr. Bucalo left office at the end of December 2016, Local 100 deemed him to be a retired member and has treated him as a retiree, both for purposes of his eligibility for membership *vel non* and with regard to his placement on the film work referral list. 2018 Stipulations, 2018 Jt. Ex. 1, ¶, 1-5; 2018 Tr. 55-59, 105-06 (Bucalo); 2019 Tr. 330-35 (Webster); 2019 Ex. R. 5.

When Mr. Bucalo lost his Union position, he requested to be placed on the Union’s referral lists for work in the construction and film industries; only the film referral work is at issue here. Historically, film production work in the greater Cincinnati area has been very limited and quite sporadic; on occasion, there have been a handful of productions in a single year, but there was also at least one period of nearly a year when there was no movie or television work at all. Recently, the greater Cincinnati area has seen increased film production work. Nonetheless, drivers performing movie industry work represent a tiny percentage of the employment within Local 100’s jurisdiction, with the complement of drivers on a film ranging from six to ten to as many as 25. Some drivers attempt to make a career of the work, which pays well but is neither consistent nor reliable; the Union’s Transportation Captain, Craig Metzger,

¹ Mr. Bucalo testified that, once he was elected, he wanted to work one day per week at UPS and the remainder of the week in his position at Local 100, purportedly to save the Union money by obtaining his health insurance benefits through UPS instead of the Union. Such an arrangement was unprecedented at Local 100 and, as Union President Dave Webster testified, would have been unworkable because the Secretary-Treasurer position is a highly demanding, full-time job. 2018 Tr. 55-56 (Bucalo), 241-42, 255-26 (Webster).

testified he worked a total of only five or six months in all of 2017. While the work might be considered desirable because of the pay, it is available only to drivers who do not have other, steadier employment because of the weeks of long hours it involves, often on nights and weekends.

Local 100 uses standard Teamster contracts for film and television productions that are shot in its geographical jurisdiction, with the terms based on the size of the production and its budget. The contracts establish an exclusive referral and hiring process for drivers for this work, although they do not specify how the hiring hall is to be operated, and different local unions may have different procedures. 2018 Tr. 269 (Webster), 333, 389-90, 399, 423-33 (Metzger); 2018 Ex. GC 15; 2019 Ex. GC 20.

Craig Metzger has managed the film work referrals since approximately 2014, when he was appointed as the Transportation Captain. President Webster learned that Mr. Metzger, whom he did not know personally, had taken on many of these tasks informally after the prior Captain was removed from a production by the employer, and the other drivers believed he would do well as Captain, so Mr. Webster appointed him to that position.

Over the years, the referral procedures in place in the Cincinnati area were largely informal and unwritten. However, whether in writing or kept in the smart phone and in the memory of the driver who serves as the Local's Transportation Captain, the Union maintained two separate groups for referring drivers to film production work until new, written referral rules were drafted starting in late 2017. The first group consisted of individuals sometimes referred to as active or out-of-work drivers – meaning those who had been laid off or discharged from another job or who were attempting to make a career of the film work and who were not receiving any pension benefits – who are referred for work first. The second group were

individuals who were receiving retirement benefits; they were referred to work only after the first list was exhausted (or if the job requires specific skills, namely experience in car hauling). 2018 Stipulations, Jt. Ex. 1, ¶ 6; 2018 Tr. 344, 354, 394-95, 445-48 (Metzger).

Prior to the Union's adoption of a formal written referral list, Mr. Bucalo was placed on the retiree list for film work referrals – which Mr. Metzger had handwritten, as the list was growing – on June 9, 2017, after Mr. Webster referred him to Mr. Metzger to be put on the list. The Transportation Captain referred Mr. Bucalo work on a film called “Donnybrook” starting in October 2017. Mr. Bucalo was employed approximately seven weeks on that film. There were no significant problems in his performance, although Mr. Metzger testified that Mr. Bucalo called off sick from work one day, which Mr. Metzger believed no other driver had ever done, and creating a potential problem if another driver had not been available to cover his assignment. Mr. Metzger believed calling off was not acceptable in the film industry as drivers are expected to work long hours during relatively short periods of time. However, Mr. Bucalo's absence was not significant enough for Mr. Metzger to remove Mr. Bucalo from the production or take any other action against him. 2018 Tr. 118-19 (Bucalo), 200-01 (Haller), 413-16, 470 (Metzger); 2018 Ex. GC 6.

After he became Transportation Captain, Mr. Metzger occasionally mentioned to the Union his desire to have written rules and procedures for film referrals. Local 100 also agreed to prepare a written policy in a non-admissions settlement of prior charges filed by Mr. Bucalo regarding the date of his placement on the list and other matters, although as will be discussed it began doing so before that agreement was signed. The new policy was prepared starting in late

2017 and early 2018; it was drafted by one of the Union's attorneys, Julie Ford,² initially based on the discussions with Mr. Metzger and Mr. Webster and, later, with input from a few of the more experienced movie industry drivers and then the full Local 100 Executive Board. 2019 Tr. 377-78 (Ford).

All three of the individuals most involved with the preparation of the written policy testified that one of the goals was to make the policy as consistent with the existing practices as possible, while also dealing with new issues that might arise and incorporating concepts taken from other hiring hall and referral policies in the film and stage industries as well as other lines of work. Ms. Ford obtained these other referral policies, which she reviewed and later discussed with Mr. Webster and Mr. Metzger. 2019 Tr. 47-48 (Webster), 105-11 116-117 (Metzger), 378-80 (Ford); 2019 Ex. GC 10 (sample policies); 2019 Exs. R. 7 & R. 8 (Ford notes).

Ms. Ford used as the "templates" for the new film and television work referral policy Local 100's existing policy and procedures for referrals in the construction industry, which had been in place for some years, as well as the movie industry policy used by Teamsters Local 407 in Cleveland, Ohio. The group charged with drafting the new policy discussed other provisions to be added that were specific to the movie industry work, such as language about the importance of not calling off work without a valid reason, given the tight time frames involved in movie industry work, and the need to treat a diverse group of coworkers with respect. Other provisions also were included to deal with potential issues that might arise in the future, such as an employer requesting someone by name or rejecting or discharging an applicant. 2019 Tr. 105-06 (Metzger), 387-90 (Ford); 2019 GC Ex. 10-13.

² Local 100 waived the attorney-client privilege and work product protection for the limited purpose of allowing Ms. Ford to testify about her "advice and participation in drafting the movie industry referral and some related documents" and to provide her notes on that process. 2019 Tr. 370-73.

Each of the policies used as templates utilized five different tiers, or “groups,” of drivers based on experience and residence in the local area. Neither of these template policies provided for a separate listing for retirees or, indeed, even mentioned retired drivers. Ms. Ford understood that retired drivers do not work in film in the Cleveland area and that it is “uncommon” for retirees to be in a referral system; Mr. Webster believed no retirees have ever sought to work under Local 100’s construction referral policy. 2019 Tr. 48-50 (Webster), 383, 458-59 (Ford).

The attendees in the initial meeting wished to continue the existing practice of calling retirees for work but only after other, non-retired drivers had the first opportunity. 2019 Tr. 52-53 (Webster), 110-17 (Metzger), 383 (Ford); 2019 Ex. R. 10-11 (Ford notes). Therefore, the practice of retirees being placed on a separate list, to be called after the lists for non-retired drivers were exhausted, was contained in the first draft of the new, written policy, which was sent to Mr. Webster and Mr. Metzger on February 1, 2018. Mr. Metzger, Ms. Ford and possibly Mr. Webster met with three or four of the most experienced drivers on March 5, 2018, to discuss the draft policy. The drivers suggested a number of revisions and amplifications, and some expressed the view that local retirees should have preference over non-local drivers. This preference was included in the next revised draft. However, when the matter was presented on April 25, 2018, to the Local 100 Executive Board – the seven-member group of elected officers charged with managing the Union’s affairs – they determined it was more appropriate to continue the existing practice. The Executive Board decided that, in the words of Mr. Webster, “our active members and people who are not collecting a pension [should] be given [an] opportunity for employment before someone who is already collecting a retirement.” The Executive Board members discussed the changes with Ms. Ford during their meeting in a speaker phone call, and she revised the policy as requested, returning the retiree group to the end

of the order of calls. The final version of the policy was sent to Local 100 on May 1, 2018, and approved by the Executive Board at its meeting at the end of May, 2018. The Union mailed to all drivers who had worked in the movie industry or expressed an interest in doing so a copy of the new policy and a notice explaining the new policy and procedures. 2019 Tr. 52-53 (Webster); 2019 GC Exs. 2, 3, 4, 6.

The policy's definition of a retiree is an individual who is receiving pension or retirement benefits from any source or Social Security retirement benefits. (Prior to the implementation of the written policy, Mr. Metzger simply relied on his own knowledge of who in the small group of drivers was receiving a pension). Mr. Webster explained that the rationale for putting such drivers in a separate group, and having them come last in the order of call, is that "we want the people that are trying to, you know, making a living to support their families to find work before somebody who's collective a pension or Social Security. It's only fair that the people who need the work first get the work."³ Mr. Metzger testified similarly, stating, "[If] a man or a lady needs that job, if they ain't getting a pension, some come first before a person getting a pension because they're younger and they've got a family to feed. And if you've already got an income, why not let the person that don't have an income go ahead and work first, then you come in after them." He also noted that, as a group, the retired drivers did not mind working only occasionally or one or two days at a time on a film project and that was the state of affairs at the time the new policy was drafted. 2019 Tr. 110-11, 115, 124-25, 181-82 (Metzger), 43 (Webster), 448-49 (Ford); 2019 Ex. GC 6.

³ The policy also prioritizes local residents over those from outside the Greater Cincinnati area; Mr. Webster, the Local 100 President, testified that the rationale was "to take care of our own, you know, the people who live here in our – in this area, you know, before allowing outsiders, you know, to come" 2019 Tr. 40 (Webster). Such distinctions are entirely rational.

Mr. Webster and Mr. Metzger testified, consistently and credibly, that Mr. Bucalo was never singled out for purposes of placement on the retiree list or for whether or not to refer him to any particular job. Mr. Bucalo worked on the films “Donnybrook” beginning in October 2017, “Point Blank” beginning in August 2018, “Dry Run” beginning in January 2019 and again in the summer of 2019, and “Hillbilly Elegy” in August 2019. 2019 Tr. 203-4 (Bucalo).

Mr. Bucalo filed the present charge on December 10, 2018, setting forth a variety of stale allegations dating back to December 2016 and then protesting, in vague terms, the provisions of the policy the Union adopted in May 2018. The charge asserted that the new rules “are designed to continue the discrimination against me for my concerted and protected activities. The new rules are significantly different from past practices. The new rules discriminate against non-union members, women and minorities. The new rules are designed to perpetuate favoritism and discrimination.” 2019 Ex. GC 1(a).

Finally, Mr. Bucalo asserted that he should have been moved out of Group VII, for retirees, and moved into a higher group based on his experience in the movie industry. He based this assertion on the general language in the policy: “Each applicant for employment shall be registered in the highest priority group for which the applicant qualifies.” The evidence showed that Mr. Bucalo never specifically requested to be placed in a higher group from Group VII or raised any question about the cited language of the policy. (At most, after he received a copy of the new rules, he sent Mr. Webster a letter that stated generally that he “object[ed] to many items in this poorly written and ill conceived policy.” 2019 GC Ex. 17.)

On June 13, 2019, the Acting Regional Director of Region 9 issued a complaint alleging that the Union had applied the new policy to prevent retirees from advancing to a higher group,

that Mr Bucalo specifically had not been moved to Group II⁴ starting in January 2019, that the Union had discriminated against Mr. Bucalo because of his “dissident union activity” and that the Union had attempted to cause an employer to discriminate against its employees for impermissible reasons. 2019 GC Ex. 1(c) at 3. The matter was heard at trial on August 26 and 27.

The ALJ on October 24, 2019, issued a Recommended Decision and Order, JD-82-19, concluding that the Union breached its duty of fair representation by placing retirees in the lowest preference category for referral for film work and by classifying employees in categories according to experience in the “Teamster Movie Industry” and the number of productions in which they have performed “Teamsters work,” thus discriminating based upon union membership. Local 100 excepts to many of the findings of fact and conclusions of law set forth in that Decision and respectfully urges the Board to reject the ALJ’s recommendations and to dismiss the underlying charge.

III. ARGUMENT

Contrary to the conclusions of the ALJ’s Decision, the General Counsel did not meet its burden of proving that the Union’s conduct in this case was discriminatory or, most significantly, that there was any animus toward Mr. Bucalo because of his dissident union activity, much less that there was a nexus between any alleged animus and the decision to draft referral rules that placed retirees in the lowest referral category. The Respondent does not dispute the ALJ’s review

⁴ The Complaint asserts that Mr. Bucalo should have been moved to Group II. However, even if he were moved out of the retiree group based on his experience in the movie industry, he would have qualified only for Group III. Group II is for drivers who have two or more years of experience in the movie industry and have worked on at least three productions in the past two years. Mr. Bucalo first worked in the film industry starting in October 2017; on the cited date of January 2019 and at the time of the issuance of the complaint and the time of the trial, he had less than two years of experience in the industry and did not meet the qualifications for Group II. Therefore, if he were not in the separate retiree group, he would be placed in Group III, which is for local resident applicants who do not meet the Group I or Group II qualifications.

of the applicable case law regarding the duty of fair representation, apart from the ALJ's failure to address a required nexus between any animus, the existence of which the Union denies, and discriminatory conduct. Indeed, the Union agrees with the ALJ's findings that "a policy placing retirees in the lowest referral category would not be illegal" and "Local 100 clearly has a legitimate reason for placing retirees in the lowest referral category." 2019 ALJ Decision at 8 and 9. However, the Union respectfully submits that the ALJ's Decision contained factual errors and improperly applied the legal analysis regarding the issues of animus and a nexus between alleged animus and the process of drafting written referral rules.

A. The evidence did not establish that Local 100 maintained any animus toward Mr. Bucalo, nor that there was any nexus between any alleged hostility and the Union's drafting of its movie industry referral policy.

It is clear from his testimony in the two trials that Mr. Bucalo sees hostility and animus against him in nearly every corner. As discussed in some detail in the Respondent's Post-Trial Brief to the ALJ in the 2018 case, Mr. Bucalo has a history of negative interactions and relationships with other officers and representatives of Local 100, including the current and most recent past Presidents – both of whom had once been his running mates. At one point, he even asserted that the staff and Regional Director of Region 9 were retaliatory against him, in their case for his filing of appeals of the dismissal of most of his many ULP charges after he left office at Local 100. However, despite his acknowledged high level of charge-filing and other activity, the General Counsel's evidence in this case did not show that anyone at Local 100 actually had animus against Mr. Bucalo. Furthermore, the evidence does not support a finding of any nexus between the alleged animus toward him and any of the provisions of the referral policy that are at issue in this case.

When a union operates an exclusive referral service, it breaches its duty of fair representation when it acts in an arbitrary, discriminatory, or bad faith manner. Teamsters Local 631, 340 NLRB 881, 883 (2003). In determining whether a union operating an exclusive referral service has violated the Act by failing or refusing to refer an individual out for employment, the Board applies both the duty-of-fair-representation framework, above, as well as the analytical framework set forth in Wright Line, 251 NLRB 1083 (1968), which was approved by the Supreme Court in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

Under the Wright Line analytical framework, the General Counsel must establish: (1) the employee/union member engaged in protected activity; (2) the employer/union has knowledge of that activity; and (3) the employer/union acted in whole or in part because of animus toward the employee or that the employee's protected conduct was a motivating factor in the adverse action. NLRB v. General Fabrications Corp., 222 F.3d 218, 226 (6th Cir. 2000). Among the factors supporting an inference of animus are: suspiciousness of timing, departure from past practice, disparate treatment, shifting or inconsistent reasons, and false or pretextual reasons given to explain adverse actions. W.F. Bolin Co. v. NLRB, 70 F.3d 863, 871 (6th Cir. 1995); Camaco Lorain Mfg. Plant, 356 NLRB 1182, 1185 (2011).

Once the General Counsel establishes that the employee/union member's protected activity was a motivating factor in the decision, the burden of persuasion shifts to the respondent employer or union to show that it would have taken the same action even in the absence of the protected activity. The respondent cannot simply present a legitimate reason for its action, but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. Teamsters Local Union No. 200, 357 NLRB 1844, 1852 (2011).

However, this analysis was incorrectly applied to the facts adduced at trial. The evidence did not show that the Union had animus toward Mr. Bucalo. As a result, the Union's promulgation of firm referral rules and procedures that placed retirees in the lowest referral category was not motivated by Mr. Bucalo's union dissident activities. Local 100's stated reason for its action – that retirees who were drawing a pension should be placed behind individuals who were unemployed – is rational and non-discriminatory, was based on a policy in existence before Mr. Bucalo was involved in the industry and was not tied to him personally in any way.

1. The General Counsel did not establish actual animus toward Mr. Bucalo based upon his history of union dissident activity.

The Charging Party has a history of negative interactions and relationships with nearly all of the other officers and representatives of Local 100 over a period of many years. He and Mr. Webster, the current Union president, had been running mates in 2013, campaigning on the same slate in the election that year. However, a year or a year-and-a-half into their joint term in office the relationship deteriorated. Mr. Bucalo accused Mr. Webster of various types of misfeasance, including in campaign literature distributed in relation to the 2016 election when he ran against Mr. Webster for the office of President. 2018 Tr. 35-36, 43-49, 127-28, (Bucalo), 243-46, 286-87 (Webster); 2018 Ex. GC 3.

The only alleged evidence of animus on the part of Mr. Webster the ALJ's Decision cites is his comment in reply to a lengthy tirade against him on Facebook after the 2016 Union election. 2019 ALJ Decision at 3-4. Mr. Bucalo posted on his campaign Facebook page a lengthy "open letter" to the Union membership accusing Mr. Webster and his "evil minions" of dishonesty, "selling-out the membership," fostering corruption, displaying "weak leadership," paying off other candidates to act as "spoilers," and violating federal laws in relation to the election. Mr. Webster responded to this diatribe, which ran to 10 pages of screen shots, with a

brief, three-paragraph response that pointed out that Mr. Bucalo had cost the Union large amounts in attorney's fees to defend against a number of what he termed frivolous charges and that invited the members to review the Union's financial statements. 2018 Tr. 57-62, 171-72 (Bucalo); 2018 Ex. GC 4. Mr. Webster's statement in defense of this vitriolic attack on himself and the other offices of the Local Union was – unlike Mr. Bucalo's screed – free from name-calling, insults or any overt hostility; to the contrary, it was brief, calm and measured. Furthermore, Mr. Webster's characterization of Mr. Bucalo as having filed frivolous charges is accurate, since there was no evidence of any his ULP or internal union charges to date having been sustained,⁵ and therefore cannot reasonably be considered to be evidence of animus.

Furthermore, the Facebook exchange – which occurred a year before the initial discussion about what should go into Local 100's written movie industry referral policy and nearly a year and a half after the new policy was finalized and adopted by the Union's Executive Board – simply does not show any significant animosity toward Mr. Bucalo on the part of Mr. Webster, much less constitute evidence of retaliation against him by the Union as an organization so much later. In addition, the fact that Mr. Bucalo opposed Mr. Webster in the 2016 Local 100 leadership election does not in itself demonstrate that Mr. Webster had any animus toward him. That someone was an opposing candidate, in a union system that is based on democratic election of leaders, is insufficient to create an inference that the successful candidates would have animus toward their opponent long after the election.

⁵ As the ALJ's Decision notes, the majority of Mr. Bucalo's unfair labor practice charges filed between June 2017 and February 2018 were either dismissed or withdrawn. 2019 ALJ Decision at 5. It states that the Regional Director found merit in only portions of two of those charges – which resulted in the non-admissions, informal settlement agreement that included the provision for written policies and procedures – and in the case that was heard at trial in 2018 and the present one. To be clear, the 11 cases mentioned in the Stipulations in the 2018 case, 2018 Jt. Exs. 1 & 1(a), did *not* include the two charges that went to trial. In addition, the record showed that Mr. Bucalo filed four other charges on the same day as the one at issue in this case, which all were dismissed. 2019 Ex. R. 20. Therefore, the evidence shows that Mr. Bucalo filed at least 17 ULP charges against Local 100 in a year and a half, the great majority of which were dismissed. Therefore, the characterization of him as filing frivolous charges would seem to be factual.

As discussed at length in Local 100's briefing in the 2018 case,⁶ the evidence did not show any actual, unlawful animus directed toward Mr. Bucalo by either Mr. Webster or Mr. Metzger. (There is no suggestion that the other individual involved in drafting the new policy, the attorney Ms. Ford, had any animus toward him.) There was no evidence of any conflict between Mr. Metzger – who said he had “absolutely zero” involvement in Local 100's internal politics – and Mr. Bucalo,⁷ and they did not even know each other before Mr. Bucalo was put on Local 100's film referral list in the spring of 2017. 2019 Tr. 158, 163-65 (Metzger). Throughout their communications, see 2018 Exs. GC 6-8, Mr. Metzger was professional and courteous, and he had referred Mr. Bucalo to four film or television projects by the time of the trial in August 2019.

Finally, Mr. Webster testified that Mr. Bucalo's general contentiousness and filing of various internal, NLRB, and other charges did not create any animosity on his part; he “just got used to him” and put his charges “on the pile.” 2018 Tr. 240-46 (Webster). The facts show that Mr. Bucalo may have been a difficult individual – having filed charges and published accusations and insults against nearly every officer and representative of Local 100 over a period of years – but there is no evidence that Mr. Webster and Mr. Metzger, as the two Union representatives responsible for preparing the new movie industry policy or the Local's Executive Board as the group that approved it harbored specific animosity toward him because of that conduct. The evidence of animosity must relate to the actions and views of the Respondent – it

⁶ The Respondent will not restate here all of its arguments and evidence in that prior case but will refer the Board to the earlier pleadings, in particular pages 13-22 of its Post-Trial Brief and pages 11-21 of its Memorandum in Support of Exceptions in the 2018 case.

⁷ Mr. Metzger had never met Mr. Bucalo before June 2017, much less had any conflict or other negative interaction with him, and they first met in person a week or two into the filming of “Donnybrook.” Mr. Metzger said he knew Mr. Bucalo from attending Union membership meetings but agreed they had had no real interaction and certainly no disputes. Mr. Metzger had never been a political opponent of Mr. Bucalo, or a political supporter of Mr. Webster or any of Mr. Bucalo's opponents; to the contrary, he testified that he stayed well out of internal politics at Local 100. None of Mr. Bucalo's prior internal union charges or ULPs involved Mr. Metzger, who was unaware of this activity by Mr. Bucalo at the time in question. 2018 Tr. 70-71, 90, 116-17, 174 (Bucalo), 330, 383-84, 407-08 (Metzger).

cannot and should not be based merely on the conduct of the Charging Party himself. Despite Mr. Bucalo's actions and his apparent animus toward Mr. Webster and nearly every other recent past officer of Local 100, there is no evidence that they returned that hostility, much less that it influenced the Union's decision to place all retirees in the last category in the film referral list that was adopted in 2018. Furthermore, that single remark about Mr. Bucalo from Mr. Webster was made nearly a year and a half before the retiree policy was reduced to writing, making it too remote in time to be considered evidence of hostility when it comes to the preparation of the written policy. Therefore, the first inference of animus cited by the ALJ in the Decision – Mr. Webster's Facebook post – must be rejected.

2. The mention of Mr. Bucalo's name during a discussion of the need for a sick leave policy for film production work did not indicate animus

The ALJ inferred animus against Mr. Bucalo because his name was mentioned during a meeting held to discuss the details of the Union's new written film production referral list. During a meeting on December 14, 2017, Mr. Bucalo's name was mentioned by Mr. Metzger because he wanted to have a policy in the film referral rules that addressed absenteeism and lateness. Mr. Metzger recounted that Mr. Bucalo had called off sick several weeks earlier while he was working on the production of the film, "Donnybrook." It was Mr. Metzger's belief that due to the short-term nature of television and film production work, "[y]ou really have to be there and you really have to go unless you're really, really sick or something comes up." Mr. Metzger also mentioned at the meeting that he had "two or three" *other drivers* "being late all the time." Thus, he wished to include a provision that addressed absenteeism and lateness. 2019 Tr. 391-92 (Ford), 106-7 (Metzger); 2019 R Ex. 8.

Similarly, Ms. Ford testified, "Mr. Metzger was giving examples of the reasons he wanted to have some policy in there for addressing situations of employees calling off or being

late.” Her notes of the meeting – shown in brackets, before and after her notes about potential provisions of the policy to address attendance issues, including the requirement to provide reasonable notice when possible and have a valid excuse and penalty of removal from a production for two infractions on the same film – stated, “Sam called off, no explan[ation]. Got lucky, had it covered.” Ms. Ford echoed Mr. Metzger’s explanation that Mr. Bucalo had called off work without advance notice during the filming of “Donnybrook” just a month or six weeks before the meeting, so it was fresh in Mr. Metzger’s mind; he said it was “lucky” that he had another driver available to cover Mr. Bucalo’s work on the day in question.

Despite the straightforward testimony of Mr. Metzger and Ms. Ford, the ALJ believed Mr. Bucalo’s name was “mentioned [in the December, 2017 meeting] for reasons not adequately explained.” 2019 ALJ Decision at 9. To the contrary, the Union *did* provide a quite reasonable explanation for the mention of Mr. Bucalo’s name during the first meeting to discuss the drafting of a referral policy. His name came up solely as an example of the need to have fair and consistent policies for dealing with absences and tardiness under the new policy. This discussion had nothing whatsoever to do with Mr. Bucalo as a retiree, or with any of his prior protected activity such as charge-filing, nor did it single him out for any potential discipline. (Indeed, the policy as drafted would not penalize Mr. Bucalo or any other driver for a single absence, much less for an absence because of illness; instead, it provides that a driver may be removed from a production only if he or she “fails to report to work as scheduled without reasonable notice and a valid excuse, unless due to bona fide illness, injury or other emergency.”) 2019 Ex. GC 5 at 6 (Policy, Sec. 13); 2019 Ex. R. 8 at 4; 2019 Tr. 106-07, 162-63 (Metzger), 391-92 (Ford). Most significantly, that discussion simply had nothing to do with the question of whether the retirees as a group would remain in a separate list, to be called only after non-retired drivers.

Because the Union has an entirely reasonable explanation for the mention of Mr. Bucalo's name during the film referral list drafting meeting with Mr. Metzger, one that does not indicate any discriminatory intent, the second inference of animus cited by the ALJ toward Mr. Bucalo must be rejected.

3. The Union desired to establish a written referral policy even before Mr. Bucalo's ULP charge that led to a June 2018 non-admission settlement with the Regional Director; thus, no animus could be inferred from the establishment of a written referral policy

In his Decision, the ALJ stated that he inferred animus toward Mr. Bucalo because the Union was required to draft film referral list rules as a result of a ULP charge filed by Mr. Bucalo. However, this inference is not supported by the facts. The process of drafting the film referral rules began *nearly one year before* the settlement agreement between the Union and the NLRB took effect. Moreover, the idea of putting the procedures in writing had been discussed for some time, but there had been no particular urgency to create a written document and the Local Union simply had not gotten around to it. The Union was not hostile to the concept of having more formal, written policies, and its agreement to do so would not have created any animus.⁸

According to the uncontroverted testimony of Ms. Ford, she first met with Mr. Metzger in 2017, when Mr. Bucalo filed his first ULP charge relating to the film policy. The Transportation Captain mentioned then that he would like to see written film referral rules. In

⁸ Indeed, a union is not required to have written criteria for referrals from its exclusive hiring hall. Stage Employees Local 412, 308 N.L.R.B. 1084, n.4 (1992). Rather, a union violates Section 8(b)(1)(a) of the Act only when it "operate[s] an exclusive hiring hall without any *objective* standards, written or unwritten." Id. (emphasis in original). See also IATSE Local 592, 266 N.L.R.B. 703, n.2 (1980)(noting that, while the lack of written standards is a "factor" in evaluating whether a union had used objective criteria in making referrals, the Board "would not find that a union's failure to keep written records or to use written rules would, standing alone, constitute a violation of Sec. 8 (b)(1)(A) and (2) of the Act)(citation omitted). In this case, Local 100 voluntarily agreed to put the rules and policies in writing, as it already had intended to do.

fact, Mr. Metzger testified in the first trial – which, notably, did not involve any dispute over the content of the written rules – that he had mentioned to Mr. Webster wanting to have written rules and policies after he first took over as Transportation Coordinator in 2014; however, he said, “between work and everything else, family stuff, we just never really could get together to do it.” In their discussion in about the spring of 2017, long before any settlement agreement was proposed or drafted, Ms. Ford agreed that “written rules are better than unwritten rules as a general practice,” and the two of them discussed the writing of formal rules for the film industry. 2019 Tr. 378-79 (Ford); 2018 Tr. 395 (Metzger).

This meeting was held before the first draft of the settlement agreement between the Union and the NLRB, which occurred in the fall of 2017. The drafting process of the settlement agreement took multiple months; the final settlement agreement was not signed until May 2018. Even though the settlement was not binding in 2017 and early 2018, the Union decided to move forward with the adoption of written policies. Ms. Ford began the process by doing research in the fall of 2017 on other film and television referral policies from Teamster locals and other unions in similar industries that she was able to find on the internet. One of the first meetings held to discuss the adoption of the policy occurred on December 14, 2017, months prior to the settlement agreement taking effect. 2019 Tr. 378-380 (Ford).

Rather than wait, then, the Union began the process of researching and drafting referral rules beginning in the fall of 2017. The initiative shown by the Union does not support an inference of animus and therefore cannot support a charge of discrimination against Mr. Bucalo. In addition, there was no evidence at all that the Union was reluctant to have written rules – to the contrary, as noted, the Transportation Captain had mentioned a desire to have a more formal policy when he first took on the job in 2014 and again when he met with the attorney in 2017 –

or that formalizing the policies and procedures was in any way adverse to the Union. Simply put, there was no reason for the provisions of the settlement agreement requiring written policies to engender any animosity toward Mr. Bucalo. Therefore, the third inference of animus cited by the ALJ in the Decision must be rejected.

4. The Union drafted the film referral policy over the course of several months with input from a variety of members; ultimately the Union decided to continue its practice of referring retirees last, a practice that predated Mr. Bucalo's involvement in film work.

The ALJ inferred animus from the Union's decision to move retirees from the lowest category in the first draft of the film referral rules, to a higher category in the second draft, and then, finally, back to the lowest category in the final draft. However, this was based on a decision by the Executive Board that it was best to continue the existing practice of calling retirees after the active list was exhausted and that there were sound and legitimate reasons to do so.

It was undisputed that, prior to the drafting of written film production referral rules, Mr. Metzger had a consistent, if informal, practice of calling retirees last. Before the first time he called retirees, when there happened to be a shortage of drivers, the Captain had called the Union president to ask whether retirees were even permitted to work. In the early 2000s, the Union had a policy not to refer retirees to any film work – a policy that the then-Regional Director concluded was not improper, Ex. R. 6 – based only in part on the difficulties of suspending and reactivating their pension benefits when they worked. When the Union did begin to refer retired drivers to film productions for overflow work or specialty driving for car haul, Mr. Metzger uniformly referred them after the other group was exhausted. When he first reduced the list to writing, in June 2017, he placed the retirees on a separate handwritten list.

Mr. Webster testified that, although he let Mr. Metzger “run the show” on film and television production and did not involve himself in the specifics of assignments, he was aware of and approved the informal policy of calling active drivers ahead of retirees. He explained that he believed it was more appropriate to offer the work first to “active employees” who “don’t have any income besides when they work,” before offering it to individuals who are collecting “at least some kind of retirement.” 2019 Tr. 44, 71 (Webster), 79, 123-28 (Metzger); 2019 Ex. GC 18. When it came time to adopt formal rules and procedures, Mr. Metzger testified that the rationale for continuing to place retirees in the lowest referral list was partly because most of the retirees did not wish to work more than two or three times per week, in addition to the concern that drivers who did not have source of income from retirement benefits should have the first opportunities to work.

Based on input from a few of the more experienced movie industry drivers at the March meet, who felt the need to favor all local-area drivers over those from out of town, regardless of retirement status, Ms. Ford prepared a new draft that moved retirees ahead of non-local residents. However, this revision was not yet reviewed by the officers of the Union; she could not recall if Mr. Webster as President was present at the meeting or if only Mr. Metzger and three or four drivers were there.

When the Executive Board considered that draft, the second one, it requested that Ms. Ford revise it again to restore the status quo, which was to place retirees in the lowest group to be called after non-retired drivers, which would be Group VII. Mr. Webster – who, contrary to a statement in the ALJ’s Decision was at the April 25 Executive Board meeting, although he did not testify in detail about the discussions there – explained that the rationale for this decision was

to give “active members and people who are not collecting a pension . . . an opportunity for employment before someone who is already collecting a retirement.” 2019 Tr. 40 (Webster).

The members of the Executive Board phoned Ms. Ford during their meeting on April 25, 2018, when the policy was being considered for adoption, to discuss some of the provisions, including the placement of out-of-town residents and the placement of retired drivers. As she explained, “the executive board wished to retain the existing policy of having the retirees be in the last category . . . for the same reasons that they always have retirees at the bottom, at least in recent years.” Ms. Ford recalled the discussion generally, including the Executive Board members believed that “the existing policy that had been in place, at least for as long as Craig Metzger had been captain” – that is, “the policy of the retirees being on a separate list coming last after other drivers” – should continue. She testified that the Board members who spoke in that conference call expressed the view that there was “no reason to change the existing practice” and felt “that retirees who had at least some income should come after individual who were trying to make a living in the movie industry, even if those people might come from Louisville or Columbus or wherever.” Ms. Ford testified that Mr. Bucalo’s name did not come up in these discussions and, as noted previously, at the time there were three other drivers on the retiree list in addition to him. 2019 Tr. 431-32, 437-39 (Ford).

The Union’s decision to place retirees in the lowest referral category did not occur because of Mr. Bucalo’s dissident union activity. Instead, it was a continuation of a practice that was first established by Mr. Metzger,⁹ an individual who had no history of animus toward Mr. Bucalo and who did so long before Mr. Bucalo expressed any interest in movie industry work. The continuation of the practice was approved by the Executive Board members, who desired to

⁹ Mr. Metzger’s predecessor as Transportation Captain, Billy Baxter, Sr., had little specific recollection of who he had ever called for work and when, and he was uncertain if he had ever called a retired driver. 2019 Tr. 271-72 (Baxter).

support unemployed drivers who do not enjoy the safety net provided by a pension. Indeed, the notice sent to drivers of the adoption of the new policy, dated June 26, 2018, referred to the Union's existing practice: "Retired drivers who were receiving a pension are, in *accordance with the longstanding practice*, eligible to be on the referral list but are referred to job positions only after non-retirees." 2019 Tr. 110-11, 127-28 (Metzger); 2019 GC Ex. 2 (emphasis added). Because the Union had a "legitimate reason" for retaining the practice of keeping the retirees at the end of the list,¹⁰ the ALJ's fourth inference of animus should not stand.

5. The ALJ's decision ignores that common indicia of animus were not present.

Many factors can contribute to a finding of animus. See, e.g., W.F. Bolin Co., 70 F.3d at 871. These may include inconsistencies between the proffered reason for the union or employer's actions, disparate treatment of certain employees compared with other employees with similar work records or offenses, a deviation from past practices, and proximity in time between the

¹⁰ Although it is not specifically addressed in the ALJ's decision, the theories of the Charging Party and the General Counsel also included that Mr. Bucalo and the other retirees should have been moved out of Group VII based on their experience, and not retained on the retiree list permanently, under the language in the introductory portion of the policy that states: "Each applicant for employment shall be registered in the highest priority group for which the applicant qualifies." 2019 Ex. GC 5 at 1, ¶ 3. The General Counsel suggested that this language must mean that even retirees have to be moved up and that it was not applied in this manner solely out discriminatory animus toward Mr. Bucalo. Alternatively, the argument was that it creates an ambiguity that must be read in favor of Mr. Bucalo and against the Union.

The Union submits that this general language is superseded by the more specific language about the placement of retirees in the last group, which was amplified and explained in the notice sent to the drivers announcing the new policy. Furthermore, even if there were some ambiguity, it was inadvertent and the policy clearly was not intended to be read as the General Counsel urges. The evidence showed that this language was simply retained from the same provision in the Local 100 construction industry referral policy, which was used as the base for the film policy. Neither Mr. Webster nor Mr. Metzger recalled any discussion of this sentence, and Ms. Ford also testified credibly that it was never discussed, in the context of the movement of retirees out of Group VII or with regard to Mr. Bucalo specifically, either in the drafting or the administration of the policy. She stated that the drafters did not consider this possible reading of the two provisions of the policy – and, specifically, said that it "never occurred to [her] that that's how someone might read it" – and that, had they thought of this potential construction, the policy would have been worded differently to address the issue. 2019 Tr. 36-37 (Webster), 108 (Bucalo), 429-33, 456-57 (Ford).

employee's actions and the alleged harmful action on the part of the union or employer. None of these factors is present here.

In this case, there was no deviation from the Union's past, unwritten procedure of referring retired drivers last to the Union's adoption of written referral rules that placed retired drivers in the lowest referral category. As noted, Mr. Metzger testified without contradiction that – aside from specialized jobs that required skills not held by active drivers, such as car-hauling – he always has referred retirees last, after any non-retired, out-of-work drivers; this was a change from a previous system in which retirees were not eligible for such referrals at all. 2019 Tr. 111 (Metzger). This practice was continued, for the policy reasons already discussed and because the Union wanted its written policy to be as consistent as possible with the existing, informal procedures.

In addition, the Union has not put forth any shifting, inconsistent or false explanations for its actions. The rationale for placing retired drivers in the lowest referral category, according to Mr. Metzger and Mr. Webster was to give individuals who did not have the security of a pension the opportunity to earn a much-needed paycheck. The Union's reasoning for the policy, both when it was unwritten and when the formal policy at issue here was adopted, has been consistent, thus supporting a finding that no animus toward Mr. Bucalo exists. 2019 Tr. 40 (Webster), 110, 115 (Metzger); 2019 GC Ex. 18.

The other indicia of animus or pretext are suspiciousness of timing and disparate treatment. Neither of these is present in this case. Mr. Bucalo ran for Local 100 President in an election that was held in late 2016, and he was placed on Mr. Metzger's firm referral list as a retiree in June 2017. The written firm referral procedures were not adopted until May 2018. There were no specific actions or statements on the part of anyone in the Union from June 2017

through May 2018 that evidence any animus, nor was there any specific action by Mr. Bucalo that could have been the trigger for any claimed retaliation.¹¹

There also was no evidence of disparate treatment. Mr. Bucalo and the General Counsel did not provide any evidence of any other retiree ranked lower on the referral list being referred ahead of either Mr. Bucalo or non-retired, out of-work drivers. Only in very specific situations, such as when skilled drivers were needed and no non-retired drivers were available, were retirees called ahead of non-retired drivers. Therefore, there is no one to whom Mr. Bucalo might be compared who was treated differently and no disparate treatment. 2019 Tr. 165-6 (Metzger). Notably, Mr. Metzger's own father, who has more experience in movie industry driving than Mr. Bucalo and than others on the non-retiree lists, was treated precisely the same. Taken as a whole, the evidence does not support the conclusions of the ALJ that the Union drafted and adopted film referral rules and procedures that placed retirees in the lowest referral category out of an animus toward Mr. Bucalo.

B. Even when animus does exist between a union member and the union, the General Counsel still must establish a “nexus” between the animus and the action.

The third prong of the Wright Line test requires the General Counsel to establish “that an adverse employment action resulted in whole or in part from...animus, or that the [union member's] protected conduct was a motivating factor in the adverse action.” NLRB v. General Fabrications Corp., 222 F.3d at 226. In other words, the establishment of the General Counsel's prima facie case “requires the showing of some nexus between...animus and a particular [discriminatory action].” NLRB v. Fluor Daniel, Inc., 161 F.3d 953, 969 (6th Cir. 1998). The

¹¹ It is true that Mr. Bucalo did continue to file ULP charges during this period, as he had in the past. However, as noted, nearly all of those charges were withdrawn or dismissed. More to the point, Mr. Webster testified, credibly and without contradiction, that he was not particularly bothered by these charges but just “put them on the pile.”

nexus must be “sufficient to warrant the reasonable inference that discrimination was a ‘motivating factor’ in an identifiable employment decision.” Id.

For example, in Brand Mid-Atlantic, Inc., 304 NLRB 853, 854 (1991), a union member had a “longstanding feud” with the local’s business representative and had brought internal union charges against him. The member subsequently requested but was not referred to employment through the union’s non-exclusive hiring hall. Later, the worker and the business agent engaged in an argument at a membership meeting, where the union representative referred to the member as a “troublemaker” who “would never work again in this Local.” Id. at 855. The Board found that, although the General Counsel had “established a strong animus” toward the charging party by the union representative, it failed to prove “any nexus between that animus and the failure to refer,” while the union had “successfully met its burden of showing that its failure to refer [the employee] ... was nondiscriminatory.” Id. The Board credited the union agent’s testimony that “in selecting men for work, he considered three factors in making his decision: who had been unemployed the longest, whether the individual had the skills necessary to perform the job, and whether the individual could get to that job,” and found that, given these criteria, there was no “evidence that [the Charging Party] was entitled to referral ahead” of the four individuals whom the union referred. Id.

In this case, there was no such “strong animus” shown, nor indeed any animus proved on the part of the Union. According to Mr. Webster, after Mr. Bucalo visited asked to be placed on the film production and construction referral lists, he passed along Mr. Bucalo’s name and telephone number to Mr. Metzger, who did put him on the list. Since then, he has been referred to four film production jobs: “Donnybrook,” “Point Blank,” “Dry Run” and “Hillbilly Elegy.” 2019 Tr. 54-55 (Webster), 203-4 (Bucalo).

Finally, not only was the General Counsel unable to show that any of the individuals who made the decisions at issue in this case bore any sort of animus toward Mr. Bucalo, the General Counsel presented no evidence that proved a nexus between the alleged animus and the promulgation of rules that placed retirees last on the referral list. As a result, the allegation that the Union discriminated against Mr. Bucalo must be rejected and the ALJ's decision on this point overruled.

C. **Even in the absence of Mr. Bucalo's dissident union activity, the Union would have drafted a film referral list that placed retirees in the lowest referral category, for legitimate reasons.**

If the General Counsel can establish a prima facie case of discrimination on the part of the union because of dissident union activities, the burden shifts to the respondent to show, by a preponderance of the evidence, that it would have taken the same action absent the protected activity. DynCorp, Inc. v. NLRB, 233 Fed. App'x 419, 431 (6th Cir. 2007). In this case, the Union can make this showing – regardless of the failure of the General Counsel's prima facie case – because it would have promulgated written film referral rules that placed retirees in the lowest referral category in the absence of Mr. Bucalo's desire to be placed on the film referral list. for two reasons. First, placing retirees in the lowest category on the film referral list continued a past practice of referring retirees after all non-retired drivers. Second, Local 100 wished to refer film production jobs to individuals who are unemployed and actively seeking work ahead of retirees who are receiving at least some income in the form of pension benefits. While there could be some disputes about how much an individual retiree is receiving, and whether a driver receiving a pension still might want or need to supplement that income, the distinction is rational and reasonable.

As discussed, Mr. Metzger consistently called retired drivers last. His handwritten list from 2017 placed retired drivers in the second of two categories. Mr. Webster also understood and believed that Mr. Metzger referred retirees last, and Ms. Ford testified that one of the goals in drafting the written policy was to retain the existing practices and procedures as much as possible. 2019 Tr. 44 (Webster), 110, 115 (Metzger), 378-80 (Ford); 2019 GC Ex. 18.

Second, the Union would have drafted referral rules and procedures in the absence of Mr. Bucalo's conduct given the Union's strong view that people who needed work but did not have a retirement income as a safety net should get priority. As Mr. Metzger stated,

I think if you're getting a pension...from driving a truck or any kind of pension from anywhere, that, you know, a man or a lady that needs a job, if they ain't getting a pension, some come first before a person getting a pension because they're younger and they have a family to feed. And if you already got an income, why not let the person that don't have an income go ahead and work first, then you come in after them. That's my personal opinion.

2019 Tr. 115 (Metzger). He expressed this view in the initial meeting for the drafting of the film referral rules. Similarly, Mr. Webster said, "our active members and people who are not collecting a pension [should] be given an opportunity for employment before someone who is already collecting a retirement." 2019 Tr. 52 (Webster). Finally, Ms. Ford testified that the Executive Board members who spoke with her by phone during the April 2018 meeting also expressed this position. The ALJ called this rationale "clearly...legitimate," and said the Union had a "valid reason," for giving preference to drivers without an income. 2019 ALJ Decision at 8-9.

Based upon this evidence, and the utter lack of any evidence of pretext, the Union satisfied its burden under the Wright Line framework to show that it would have taken the action in the absence of Mr. Bucalo's dissident activity. Accordingly, the Union did not violate its duty

of fair representation to Mr. Bucalo or any other applicants for movie referrals by continuing the practice of placing retirees last for referrals.

D. The referral rules do not discriminate on the basis of union membership.

The ALJ found that, despite the referral policy containing specific language that the Union will not discriminate based upon lack of union membership, the rules violate the Act because they refer to “Teamster work” and the “Teamster Movie Industry,”¹² creating at least an ambiguity that must be resolved against the Union. As the testimony of Mr. Webster and Mr. Metzger showed, the phrases “Teamster work” and “Teamster Movie Industry” were not used to describe required union membership but, rather, as short-hand to describe the *type* of work that is covered by the referral policy and that would be used to determine a driver’s experience for purposes of placement on the lists, regardless of union membership.

An exclusive hiring hall arrangement necessarily tends to encourage union membership. However, because the Act only proscribes encourage or discouragement of union membership which is accomplished through discrimination, a union does not commit an unfair labor practice unless it administers an exclusive hiring hall in a discriminatory or arbitrary fashion or in a way that favors Union membership. Local Union No. 948, Int’l Broth. of Elec. Workers v. NLRB, 697 F.2d 113, 117 (6th Cir. 1982). “In order to find a violation of the Act in the operation of an exclusive hiring hall, the Board...may find a violation where the union refuses to place non-members on the referral list or gives members preference on the referral list or give members preference over non-members in referrals.” Id.

¹² Group I, the highest group on the film referral list, is for “all applicants for employment who have four (4) or more years of experience in the Movie Industry, who are residents of [the greater-Cincinnati area] and who have been employed performing Teamster work in the Movie Industry on at least six productions in the past four (4) years in the [greater-Cincinnati area].” There is a similar definition for Group II, but for those with fewer years of experience and fewer movie jobs.

In this case, the General Counsel presented no evidence the Union refused to place non-members on the referral list. The sole dispute is whether the phrases “Teamster work” and “Teamster Movie Industry” give members preference on the referral list. They do not. There was no intention to limit the list to Teamster members. According to Mr. Webster, “you can come off the street and sign up for the movie industry.” However, there are a variety of crafts and trades in the movie industry that do not involve driving trucks and that are not with the Teamsters’ jurisdiction. The phrases at issue were placed in the referral rules to differentiate between experience in the movie industry driving trucks – which are the jobs that Teamster members typically perform in the film industry – and experience in carpentry, or electrical rigging, for example, that would not count toward placement on the Local 100 referral list. According to Mr. Metzger’s understanding of the referral list, if an individual had experience driving trucks but it was not on a Teamsters production, that experience *would count* toward the number of jobs in the “Teamster Movie Industry” for purposes of placement on the lists. “Just ‘cause it wasn’t a union movie doesn’t mean you wouldn’t put your driving job that you’ve done before on your [resume],” according to Mr. Metzger, for purposes of placement in the top referral categories of the referral list. 2019 Tr. 69-70 (Webster), 144-45 (Metzger).

The testimony of Mr. Webster and Mr. Metzger, combined with the introductory language to the Union’s referral list, do not create an ambiguity. Thus, the referral rules do not discriminate on the basis of union membership, nor suggest that they do to any potential applicants, and do not violate the Act.

IV. CONCLUSION

The record does not support the conclusion that Local 100 violated its duty of fair representation to Mr. Bucalo or anyone else or that its written policy is subject to an

interpretation that favors Union members over non-members. Therefore, based on the evidence, legal standards, and reasons set forth here, the Respondent Teamsters Local 100 respectfully requests that its Exceptions be granted, the ALJ's Decision rejected and the Complaint dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Support of Exceptions to the Recommended Decision and Order of the Administrative Law Judge was filed electronically with the National Labor Relations Board, and was served by electronic mail on NLRB Region 9 Acting Regional Director Patricia Nachand (patricia.nachand@nrlb.gov), Counsel for the General Counsel Naima R. Clarke (naima.clarke@nrlb.gov) and Charging Party Samuel J. Bucalo (sammo1245@aol.com), on this 21st day of November, 2019.

John R. Sauter